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ALEXANDER L. STEVAS

No. 82-862

In the Supreme Court of the United States

October Term, 1982

CONSOLIDATED RAIL CORPORATION,
Petitioner

vs.

THOMAS LeSTRANGE,
Respondent

BRIEF OF RESPONDENT, THOMAS LeSTRANGE, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counter-Statement of the Questions Presented and Parties to the Proceeding

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Does §504 prohibit employment discrimination on the basis of a handicap by federal grantees, regardless of the nature, purpose and intended beneficiaries of the federal financial assistance?

(Answered in the affirmative.)

2. Whether the prohibition against discrimination under §504 can be enforced by means of a private cause of action?

(Answered in the affirmative.)

PARTIES TO THE PROCEEDING

Respondent adopts the statement of the parties to the proceeding in petitioner's petition.

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CITATION OF THE OPINIONS BELOW

The text of the opinion and order of the United States District Court for the Middle District of Pennsylvania appears at the appendix of the Petition for Writ of Certiorari commencing at page A-25. The opinion of the Court of Appeals for the Third Circuit has been reported at 687 F.2d 767 (3d Cir. 1982) and the text of said opinion is set forth in the Petition for Writ of Certiorari commencing at page A-1. A prior opinion and order of the United States District Court for the Middle District of Pennsylvania was reported at 501 F. Supp. 964 (M.D. Pa. 1980). The text of that opinion is contained in the Petition for Writ of Certiorari at page A-53.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The judgment of the Court of Appeals was entered on September 1, 1982.

STATUTORY PROVISIONS INVOLVED

The text of the following statutes is set forth in petitioner's Petition for Writ of Certiorari at pages 2, 3 and 4:

1. 29 U.S.C. §794, as amended, Pub.L. 95-602, Title I, §§119, 122(d)(2), Nov. 6, 1978, 92 Stat. 2982, 2987;

2. 29 U.S.C. §794a, Pub.L. 93-112, Title V, §505, as added Pub.L. 95-602, Title I, §120, Nov. 6, 1978, 92 Stat. 2982;

3. 42 U.S.C. §2000d, Pub.L. 88-352, Title VI, §601, July 2, 1964, 78 Stat. 252;

4. 42 U.S.C. §2000d-3, Pub.L. 88-352, Title VI, §604, July 2, 1964, 78 Stat. 253;

5. 20 U.S.C. §1681, Pub.L. 92-318, Title IX, §901, June 23, 1972, 86 Stat. 373.

COUNTER-STATEMENT OF THE CASE

The respondent, Thomas LeStrange (LeStrange), incorporates by reference the statement of the case made in the Petition for Writ of Certiorari filed by the petitioner, Consolidated Rail Corporation (ConRail). However, the respondent does not adopt the same as being an accurate representation of the facts in the case. Rather, the statement of the case previously filed should be read in conjunction with the following counter-statement of the case.

The original complaint in the case was filed on September 22, 1978 which was approximately one and one-half months prior to the amendments to §504. After a year of settlement negotiations and various tests which were conducted by the petitioner, an amended complaint was filed on October 26, 1979. The amended complaint, as well as the original complaint, indicated that ConRail had violated the Equal Protection Clause of the 14th Amendment to the Constitution of the United States, and 29 U.S.C. §794, commonly referred to as the "Rehabilitation Act of 1973" as amended, and seeking injunctive relief, compensatory damages, punitive damages and attorneys fees. On November 4, 1980, the District Court for the Middle District of Pennsylvania granted the defendant's motion to dismiss the plaintiff's claim based upon the Equal Protection Clause and the Civil Rights Act, but denied their motion to dismiss as to the claim of the Rehabilitation Act of 1973 (see: *LeStrange v. Consolidated Rail,* 501 F. Supp. 964 (M.D. Pa. 1980)).

Counter-Statement of the Case

The plaintiff had been employed by the Erie Lackawanna Railroad as a locomotive engineer. On March 17, 1971, the plaintiff underwent a partial amputation of his left forearm. One month later, on April 17, 1971, the plaintiff reported to work as an engineer with the Erie Lackawanna Railroad but was refused employment without the benefit of a medical evaluation or hearing. During 1973, the defendant became a successor in interest to the Erie Lackawanna Railroad pursuant to the Regional Rail Reorganization Act of 1973, 45 U.S.C. §§701-779 (Rail Act). From 1973 to April 4, 1978, the defendant refused to employ the plaintiff in any capacity and said refusal was made without allowing the plaintiff the benefit of a medical evaluation or a hearing on the matter. At all times, the plaintiff was ready, willing and able to work as an engineer. On April 4, 1978, ConRail authorized a medical examination for the plaintiff to determine his employability. This medical examination proved that the plaintiff was capable of performing his work as a railroad engineer. Thereafter, on May 2, 1978, the defendant, without a hearing, classfied the plaintiff as not qualified for the occupation of engineer.

On February 15, 1979, ConRail scheduled a field test for the plaintiff in order to determine whether the plaintiff could perform the duties of a yard engineer. This field test, which ConRail created, was prepared in such a manner so as to insure the plaintiff's failure due to his handicap. This test required the plaintiff to perform duties which were never performed by a yard engineer, under any circumstances. Notwithstanding this, the plaintiff was able to perform substantially all of these duties,

particularly those duties which are normally performed by a yard engineer.

A second revised field test was to be given to the plaintiff but he refused to take the same, upon advice of counsel, since the second test was also structured to insure the plaintiff's failure due to his handicap.

Shortly before the scheduled trial in this case, the petitioner filed a motion for summary judgment which was granted by Judge Sylvia Rambo. The decision of Judge Rambo was reversed in a decision by the Third Circuit Court of Appeals.

This matter is now before the Supreme Court of the United States on ConRail's Petition for a Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I. §504 Prohibits Employment Discrimination on the Basis of a Handicap by Federal Grantees, Regardless of the Nature, Purpose and Intended Beneficiaries of the Federal Financial Assistance

In its opinion, the Third Circuit Court of Appeals, upon reviewing the case law, statutory authority and legislative intent, concluded that §504, 29 U.S.C. §794, prohibits employment discrimination against handicapped individuals by any federal grantee regardless of the nature, purpose and intended beneficiaries of the federal financial assistance. The Court held that the limitations as set forth in the decisions of other Circuit Courts, were improper in light of the fact that it would create an absurd situation, where a federal grantee would be denied the right to discriminate against handicapped individuals in some respects, but could continue to discriminate against them in the area of employment.

The Third Circuit Court specifically disagreed with the following decisions:

1. *Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F.2d 87 (4th Cir. 1978), cert. denied, 442 U.S. 947 (1979).

2. *Carmi v. Metropolitan St. Louis Sewer District*, 620 F.2d 672 (8th Cir. 1980).

3. *United States v. Cabrini Medical Center*, 639 F.2d 908 (2d Cir. 1981).

4. *Scanlon v. Atascadero State Hospital*, 677 F.2d 1271 (9th Cir. 1982).

This disagreement was premised upon a Supreme Court decision in *North Haven Board of Education v. Bell*, U.S. , 72 L.Ed. 2d 299 (1982).

When the Third Circuit relied on the *North Haven* decision, its reasoning was based upon two concepts. First, the restrictions for standing to bring an action under Title VI which were grafted upon §504 (see: §505 of the 1978 Amendments to the Rehabilitation Act, 29 U.S.C. §794(a) and §604, 42 U.S.C. §2000d-3) did not apply to a private cause of action. In reviewing the specific statutory language of Title VI and looking at the mechanism created under Title VII, the Court concluded that the restrictions of §604 applied only to agency action and did not apply to a private cause of action. The Court noted that this was to preclude expanded agency action in areas which Congress never intended to affect by Title VI.

The second concept relied upon by the Third Circuit in its reasoning was that if the Title VI restrictions did not apply to a private cause of action, then a private cause of action is specifically governed by the language of the Supreme Court in the *North Haven* decision cited above. The Court could find no basis for the *Trageser* line of reasoning which gratutiously grafted the Title VI restrictions upon a private cause of action. Because the language of §901 of Title IX in the *North Haven* decision was identical to the language contained in §504, the Third Circuit

Court properly concluded that the protection of §504 properly extends to employees since the language of the statute neither expressly nor impliedly excludes employees from its reach. The Court also noted that there were no other considerations which would permit a contrary interpretation.

In effect, the Third Circuit Court elevated employment discrimination against the handicapped to a level of all other types of discrimination against the handicapped. By examining the legislative intent of §504, the Third Circuit Court properly concluded that it was the intention of Congress to include employment discrimination with all other types of discrimination against the handicapped. If such is the case, there should be no special restrictions placed upon employment discrimination, where there are no special restrictions placed upon filing lawsuits based upon other types of discrimination. The Third Circuit Court noted that ConRail could not discriminate in accepting handicapped passengers since it receives federal funds and it is subject to §504. The Court then noted that it would be absurd to permit the same agency, receiving the same federal funds, to discriminate against handicapped employees. The Court could find no distinction between handicapped employees and handicapped passengers.

The Third Circuit Court also examined the post-enactment pronouncements of the Senate Committee on Labor and Human Resources. That pronouncement indicated that the Senate Committee was not satisfied with the *Trageser* decision and found that it was improper to limit the standing of handicapped employees.

Therefore, respondent believes that the Third Circuit Court properly relied upon the two foregoing concepts to conclude that the *Trageser* decision was improper. Even if the *Trageser* decision were to be upheld, the respondent believes that the funding of ConRail was sufficient to meet even the *Trageser* standards. Respondent believes that an examination of the Rail Act clearly indicates that ConRail receives the type of funding which would even meet the strict *Trageser* requirements.

Thus, based upon the foregoing, the Petition for Writ of Certiorari should be denied.

II. The Prohibitions Contained in §504 Can Be Enforced by Means of a Private Cause of Action

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The Third Circuit Court properly held that the respondent, LeStrange, could protect his rights by use of a private cause of action brought under §504.

The Third Circuit Court was guided by its reasoning in *NAACP v. Wilmington Medical Center, Inc.*, 599 F.2d 1247, 1258 (3d Cir. 1979). The reasoning in this decision was proper and was consistent with the reasonings of this Court in *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

In addition, this action was filed in September of 1978 about one and one-half months prior to the amendments to the statute in question. At the time that this action was filed, there was no procedure for filing an administrative action based upon handicap discrimination.

If this action was filed prior to the dates of the amendments, these amendments should not be applicable to this action. The only mechanism available at the time that this action was filed was a private cause of action. The respondent in this case should not be bound to ex post facto legislation.

Finally, assuming arguendo that a private cause of action does not exist under §504, this issue has been waived on appeal by the petitioner. The petitioner has been provided a number of opportunities to raise this issue in the case. A motion to dismiss was filed before Judge Nealon originally, and a motion for summary judgment was also filed before Judge Rambo. Further, an appeal was filed in the Third Circuit Court raising all of the issues of standing and the right to file a private cause of action. This issue has never been raised by the petitioner before this time and, as such, the petitioner has waived its right to raise the issue at this point.

Therefore, for the foregoing reasons, the Petition for Writ of Certiorari should be denied.

CONCLUSION

By virtue of the foregoing, the judgment of the Third Circuit Court should be affirmed and the Petition for Writ of Certiorari should be denied.

Respectfully submitted:

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CERTIFICATION

I, Joseph P. Lenahan, Esq., hereby certify that I am admitted to the bar of the United States Supreme Court.

(s) JOSEPH P. LENAHAN

JOSEPH P. LENAHAN, ESQ.

CERTIFICATE OF SERVICE

Joseph P. Lenahan, Esq., hereby certifies that true and correct copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari will be supplied to the following individuals by Murrelle Printing Company, printers for the respondent, on or about January 17, 1983.

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